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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 519

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC., PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion; its findings of fact and conclusions of law appear at pages 16–22 of the record. The opinion of the circuit court of appeals (R. 102–109) is reported at 156 F. 2d 296.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 24, 1946 (R. 110). The petition for a writ of certiorari was filed on September 19, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTION PRESENTED

Whether the provision in Section 1390.1 (f) of Maximum Price Regulation No. 136, issued under the Emergency Price Control Act of 1942, as amended, exempting from the operation of that regulation sales of tractors by a non-manufacturer to "an ultimate consumer other than an industrial, commercial or governmental user," applies to sales of tractors made by a dealer to farmers.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* 11–15.

STATEMENT

Petitioner is a corporation organized under the laws of California, and is engaged in business in the City of San Jose, California, selling new and used farm equipment (8, 17, 22). On October 5, 1944, the Price Administrator filed an amended complaint against petitioner in the United States District Court for the Northern District of California, under Section 205 (e) of the Emergency Price Control Act, *infra,* pp. 11–12, alleging, among other things, that the petitioner had sold certain tractors at prices in excess of the lawful maximum prices permitted by Maximum Price Regulations Nos. 133 and 136, as amended and

revised (R. 2–5). Petitioner, in its answer, raised various defenses, including the defense that the sales made by it to farmers were not subject to Maximum Price Regulation 136, as alleged in the amended complaint (R. 10). The case was tried to the judge without a jury, and at the trial it was stipulated that the alleged purchases made from petitioner between August 1, 1943, and September 25, 1943, by the persons named in the stipulation, were made by farmers for use in the cultivation of the soil and in general farming and agricultural uses (R. 11), and that none of the purchases mentioned in the amended complaint were made for use and consumption other than in the course of trade or business (R. 12). The district court concluded that Maximum Price Regulation No. 136 was applicable to the sales mentioned in the amended complaint (R. 21), and after finding that petitioner had sold ten used tractors at prices in excess of those permitted by that Regulation, entered a judgment for single damages, including an injunction which enjoined petitioner from committing future violations of the regulations (R. 14–16). The circuit court of appeals affirmed, holding that Maximum Price Regulation No. 136 was applicable to the sales involved, and that the issuance of the injunction was proper (R. 109). The only error urged in the petition for a writ of certiorari is the alleged incorrectness of the ruling of the court below that Maximum Price Regulation No. 136 was ap-

plicable to the sales of tractors made by petitioner (Pet. 2).

ARGUMENT

Maximum Price Regulation No. 136 establishes maximum prices for a wide variety of machinery and parts, and Section 1390.2 thereof provides, among other exclusions, that the regulation shall not apply to:

> (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof * * *. For the purposes of this exclusion a sale or delivery is deemed to be "at retail" (1) when made to an ultimate consumer, other than an industrial, commercial, or governmental user, * * *.

Petitioner contends that a farmer is not a "commercial * * * user" within the meaning of that term as used in this provision of the Regulation; that the sales made by it to farmers were made to ultimate consumers; and that Maximum Price Regulation No. 136 did not, therefore, apply to such sales.

It is clear, however, that the purpose of the exclusion was to remove from the operation of the Regulation only purchases made by an ultimate consumer for personal use, as distinguished from use in an economic enterprise. The Regulation covers the broad field of machinery and parts thereof. Obviously, some items of that nature (though not tractors) can be purchased for per-

sonal use, e. g., "electric storage batteries" or "radio and television apparatus and parts," which are covered in the Regulation (7 F. R. 3201). The exclusion was intended to remove only items of that character from the operation of the particular Regulation. The phrase "commercial, * * * user" is plainly broad enough to include those engaged in the economic enterprise of farming, just as the term "trade or business" appearing in Section 205 (e) of the Emergency Price Control Act has been uniformly held to be sufficiently comprehensive to include farming. See *Bowles* v. *Madl,* 153 F. 2d 21 (C. C. A. 10); *Bowles* v. *Rogers,* 149 F. 2d 1010 (C. C. A. 7); *Speten* v. *Bowles,* 146 F. 2d 602, 604 (C. C. A. 8), certiorari denied, 324 U. S. 877; *Bowles* v. *Trullinger,* 152 F. 2d 191 (C. C. A. 9). See also *American Medical Association* v. *United States,* 317 U. S. 519. Moreover, as the court below observed (R. 104), the official interpretations of Section 1390.2 of Maximum Price Regulation No. 136, show clearly that the term "commercial * * * user" appearing in that section was intended to include farming operations. The interpretation of November 25, 1942, held the regulation to be applicable to repair services on crawler tractors even though the tractors were used for agricultural purposes. See Pike and Fischer, *O. P. A. Service,* Vol. 8, p. 40:2018. The interpretation of September 1, 1943, specifically states that: "The sale of a crawler tractor by one farmer to another is subject to the Regulation. Such a sale is not a sale 'at retail,' except

pursuant to § 1390.2 (f), because a farmer is a commercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying on that activity." See Pike and Fischer, *O. P. A. Service,* Vol. 8, p. 40:2024.[1] A prior interpretation of July 7, 1943 also stated specifically that "the sale of a crawler tractor by one farmer to another is subject to the [Maximum Price] Regulation [No. 136]." See Pike and Fischer, *O. P. A. Metals* and *Machinery Desk Book,* Vol. 3, p. 60,653.[2] A construction placed by the Price Administrator upon his own regulation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock and Sand Co.,* 325 U. S. 410, 414. The construction placed on the regulation here involved by the Administrator is neither plainly erroneous nor inconsistent with the regu-

[1] Although the court below in the case of *Bowles* v. *Trullinger*, 152 F. 2d 191, 193, cited the interpretation at "Metal and Machinery Desk Book, 60:403," the correct citation of the interpretation is as herein shown.

[2] That the Price Administrator considered farming to be within the word commercial, and that he considered "commercial" and "trade or business" to be synonymous, is shown by his official interpretation of the latter term in connection with Maximum Price Regulation No. 133, covering farm equipment. That interpretation reads in part as follows:

"* * * Farm equipment purchased by a farmer is a purchase 'in the course of trade or business' since the farmer operates his farm as a commercial activity and purchases the equipment for use in carrying on that activity." (Pike and Fischer, *O. P. A. Metals and Machinery Desk Book*, Vol, 3. p. 65,182.)

lation.[3] The authorities cited and discussed by petitioner (Pet. 13–15) are not controlling here, since they but hold that a term like "commercial" may have a broad or narrow meaning according to the context in which it is found. See *Jordan* v. *Tashiro,* 278 U. S. 123, 127, wherein this doctrine was explicitly recognized by this Court, and applied to attain a result contrary to that reached in the cases relied upon by petitioner. A broad construction of the term "commercial" as used in the regulation here involved, is in harmony with the judicial construction, to which we have referred, of the statutory term "trade or business." In fact, the cases construing the latter term have referred to it as being synonymous with the term "commercial." See *Bowles* v. *Madl, supra,* at page 23; *Speten* v. *Bowles, supra,* at page 604. Nor is it significant, as petitioner suggests, that the Administrator happened to use a phrase different from "trade or business" to express the same thought. No sound reason is apparent why he should be restricted in the choice of his language any more than is the Congress. Cf. *Brook-*

[3] Nor is it impaired by the circumstance to which petitioner refers, that an amendment of July 29, 1943, specifically stated that sales at retail of certain automotive trucks and busses were subject to the regulation. As the court below observed, "In the face of the Administrator's clear statements of intention of November 25, 1942, and September 1, 1943, we cannot hold that appellant's finding of an implied intent in the above amendment is persuasive" (R. 106, footnote).

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lyn Savings Bank v. *O'Neil,* 324 U. S. 697, 712–713.

Petitioner asserts that certain advice which it received from the price specialist of the San Francisco district office of the Office of Price Administration to the effect that Maximum Price Regulation was not applicable to the sales of used tractors made by it to farmers, was a correct interpretation of that Regulation. Petitioner does not contend that the United States is estopped by that advice from urging a contrary interpretation. It is well established, of course, that in the absence of a statute to the contrary,[4] the United States may

[4] The amendatory provision which was added to Section 205 (e) of the Emergency Price Control Act by Section 12 (b) of the Price Control Extension Act of July 25, 1946 (Pub. Law No. 548, 79th Cong., 2d Sess.), is patently not applicable to this suit. The pertinent part of that provision reads as follows:

"The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

> "(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * *"

It will be observed that the advice received by petitioner in this case was given by a "price specialist," an officer subordinate in authority to and entirely different from any of the officers named in the statute. Moreover, it is apparent that petitioner did not act upon and in accordance with the advice received (R. 71–77).

not be estopped by erroneous interpretations announced by its officers. See *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389. Furthermore, the Price Administrator has by the promulgation of Revised Procedural Regulation No. 1, *infra,* pp. 13–15, established a reasonable means through which sellers may obtain from designated Price Administration officers, official interpretations upon which the sellers may rely. Consequently, an interpretation obtained in a manner other than in accordance with this procedural regulation cannot be invoked by the seller as a defense to a suit of this character. See *Schreffler* v. *Bowles,* 153 F. 2d 1 (C. C. A. 10), certiorari denied June 10, 1946, No. 1124, October Term, 1945; *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364 (E. C. A.), certiorari denied, 326 U. S. 730. Moreover, petitioner apparently did not rely on the advice which it received from the San Francisco price specialist. The letter which it received from the price specialist stated that the General Maximum Price Regulation was applicable, rather than Maximum Price Regulation No. 136 (R. 68–69), but petitioner, after receiving the letter, continued to price its used tractors on the basis of the formulae set out in Maximum Price Regulation No. 136, and not in accordance with the provisions of the General Maximum Price Regulation (R. 71–77).

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and the case does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JOHN R. BENNEY,
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GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
DAVID LONDON,
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SAMUEL MERMIN,
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Office of Price Administration.

NOVEMBER 1946.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App. Supp. V., Sec. 901 et seq.

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine:* Provided, however, *That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable pre-*

cautions against the occurrence of the violation.[1] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.* * * *[3]

2. Pertinent provisions of Maximum Price Regulation 136 (7 F. R. 5047, 7912; 8 F. R. 10662).

SECTION 1390.1. *Definition of "machines and parts" and "machinery services."* For the purpose of this Maximum Price Regulation No. 136, as amended:

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[1] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] Added by sec. 108 (b) of Stabilization Extension Act of 1944.

[3] As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States * * *."

(a) The term "machines and parts" means, and is limited to, products falling within the groups listed in § 1390.32, Appendix A, and § 1390.33, Appendix B. Any other product is subject to the General Maximum Price Regulation, unless excluded therefrom or unless subject to some other specific regulation * * *.

* * * * *

SECTION 1390.2. *Exclusions.* This Maximum Price Regulation No. 136, as amended, shall not apply to:

* * * * *

(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, except that the sale or delivery at retail of automotive trucks, trailers and busses as described in § 1390.33 (c) shall not be excluded from, but shall be covered by this regulation. For the purpose of this exclusion, a sale or delivery is deemed to be "at retail" (1) when made to an ultimate consumer, other than an industrial, commercial, or governmental user * * *.

3. Pertinent provisions of Revised Procedural Regulation 1 (7 F. R. 8961, 8965, 8 F. R. 3313, 8 F. R. 11806).

SECTION 1300.51. *Interpretations.* An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with § 1300.52 of this regulation. Action taken in reliance upon

and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application.

SEC. 1300.52. *Requirements governing interpretations.*—(a) *Requests for interpretations; form and contents.* Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder, shall make a request in writing for such interpretation. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and post office addresses of the persons involved. If the inquirer has previously requested an interpretation on the same or substantially the same facts, his request shall so indicate and shall name the official or office to whom his previous request was addressed. If the interpretation will affect operations of establishments located in more than one state, the request shall name the states in which the establishments are located. No interpretation shall be requested or given with respect to any hypothetical situation or in response to any hypothetical question.

(b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney or State Price Attorney, any Chief Attorney or Chief Price Attorney for a District Office and any Chief Counsel of a Price Legal Branch of the National Office: *Provided,* That interpretations of general application shall be announced only by the Price Administrator, the General Council, any Associate or Assistant General Counsel, or any Regional Attorney.

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